

JOINDER OF MASTER AND SERVANT

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THE SUBSTANTIVE LAW BACKGROUND

A master is subject to liability for the torts of his servants¹ committed while acting in the scope of their employment.² However, the servant is not relieved of liability to the injured person by reason of the fact that he committed the tort while acting within the scope of his employment and is also liable to the injured person.³ Thus, both master and servant are liable to the injured person for such a tort: the servant, because he personally committed the tort, and the master, because of the principle of *respondeat superior*.⁴ If the master has, without personal fault, become subject to tort liability to the injured person for the negligence of his servant, he is entitled to indemnity from the servant for expenditures properly made in the discharge of such liability.⁵

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¹ The words "master" and "servant" are used in the sense employed in the Restatement of the Law of Agency:

"A master is a species of principal, and a servant is a species of agent. The words 'master' and 'servant' are herein used to indicate the relation from which arises both the liability of an employer for the physical harm caused to third persons by the tort of an employee (see § 219-249) and the special duties and immunities of an employer to the employee." Restatement (Second), Agency § 2, comment *a* (1958).

² Restatement (Second), Agency § 219(1) (1958).

³ Restatement (Second), Agency § 343 (1958). Some courts have held that even though the master might be liable, the servant would not be liable if his conduct amounted only to nonfeasance. This limitation is discussed and disapproved in Seavey, "Liability of an Agent in Tort," 1 Southern L.Q. 16 (1916), reprinted in Seavey, Studies in Agency 1 (1941). The problem is discussed in 1 Mechem on Agency §§ 1451 ff. (2d ed., 1914), 7 Labatt on Master and Servant, §§ 2585 ff. (2d ed., 1913), and in Ferson, Principles of Agency (1954), Chapter 7. In *Richards v. Stratton*, 112 Ohio St. 476, 147 N.E. 645 (1925), the court rejected the argument of the defendant that because he was an agent, and his alleged negligence was a mere nonfeasance, he was not liable. The substantive problem of the extent of the servant's liability is outside the scope of this article.

⁴ "*Respondeat superior*, as the phrase is commonly used, summarizes the doctrine that a master or other principal is responsible, under certain conditions, for the conduct of a servant or other agent although he did not intend or direct it. In practice, it is used chiefly with reference to the liability of a master for the torts of a servant, . . ." Seavey, "Speculations as to 'Respondeat Superior'," Harvard Legal Essays 433 (1934), reprinted in Seavey, Studies in Agency 129 (1949).

⁵ Restatement (Second), Agency § 401 comment *d* (1958); Restatement, Restitution § 96 (1937); *Losito v. Kruse*, 136 Ohio St. 183, 24 N.E.2d 705 (1940), syllabus 1.

PLEADING IN ACTION AGAINST MASTER ALONE

In many cases, the injured person will prefer to bring an action against the master alone. If the agency relationship is conceded, or if it will be easy for the plaintiff to prove, the injured person will probably have no reason to bring an action against the servant or to attempt to join him as a co-defendant with his master. In actions against the master alone, an important rule of pleading has developed which is also fully applicable to actions against multiple defendants. That rule is that although the plaintiff may, if he wishes, specifically allege that the agency relationship existed, and that the tort was committed within the scope of the servant's employment, the plaintiff is not required to do so. He may instead simply allege that the defendant committed the tort. If this allegation is denied by the defendant, the plaintiff may prove the allegation at the trial by evidence tending to prove that defendant had employed a servant, and that the servant personally committed the tort within the scope of his employment. Such evidence is not a variance from the allegation in the petition that the defendant committed the tort.⁶

This method of pleading in an action against the master alone is clearly illustrated by the wording of the petition in *Rogers v. Allis-Chalmers Mfg. Co.*⁷ Plaintiff's petition alleged in part that:

Defendant drove its golf ball . . . which ball struck the plaintiff. . . . Plaintiff claims that the defendant was negligent in the following respects:

- (a) Driving its ball off the area of the hole it was playing and into the area of the next hole.
- (b) Driving its ball with greater force than it could have been driven with reasonable control over the direction of its flight.

At the trial, the plaintiff was unable to establish the existence of the master-servant relationship between the defendant corporation and the individual who drove the golf ball. However, this was simply a failure of proof; evidence as to the master-servant relationship was admissible under the allegations of the petition.

The significance of this rule in actions against multiple defendants will be discussed in subsequent sections of this article.

MOTIVES FOR JOINING MASTER AND SERVANT

There are two common motives for joining master and servant:

- (1) Uncertainty of proof of agency, and (2) the desirability of

⁶ Annot., 4 A.L.R.2d 292 (1949); *Hardenbrock v. Waitman*, 56 Ohio L. Abs. 403, 96 N.E.2d 615 (1949).

⁷ 153 Ohio St. 513, 92 N.E.2d 677 (1950).

calling the servant, during the presentation of plaintiff's case, to testify as upon cross-examination.

With reference to the first motive, there are many cases in which the plaintiff can prove that a tort was committed, but he is uncertain as to whether he can prove that an agency relationship existed between the defendant and the actual tortfeasor. If joinder of master and servant were permitted, the plaintiff could recover against the actual tortfeasor, even if he is unable to establish the existence of an agency relationship, and is therefore unable to recover against the other defendant.

With reference to the second motive, if joinder of master and servant were permitted, the plaintiff would have the right, during the presentation of his evidence, to call the defendant servant to the stand and examine him as upon cross-examination, both as to the existence of the agency relationship and as to the commission of the tort.⁸ However, the servant who is not named as a defendant cannot be cross-examined under Revised Code section 2317.07 as he is ordinarily not an officer of the corporation. Because of this limitation on section 2317.07, the Ohio General Assembly, in 1957, enacted a new statute, Revised Code section 2317.52, which provides as follows:

When the action or proceeding relates to a transaction or occurrence *in which it has been shown or it is admitted* that the adverse party acted either in whole or in part through an agent or employee, such agent or employee of the adverse party may be called as a witness and examined as if under cross-examination, upon any matters at issue between the parties *which are shown or admitted* to have been within the scope of such agent's or employee's authority or employment.

The party calling for such examination shall not thereby be concluded but may rebut such agent's or employee's testimony by counter testimony.

The party whose agent or employee is called as a witness by the adverse party and whose agent or employee is examined as if under cross-examination shall not thereby be concluded but may rebut such agent's or employee's testimony by counter testimony. (Emphasis added.)

This statute may make it unnecessary, in some cases, to join servant and master. The plaintiff may sue the master alone, and call the non-party employee for cross-examination under Ohio Revised Code section 2317.52. However, this statute may not be a solution to plaintiff's problem in some cases. If the defendant master does not concede that the witness called by plaintiff is an employee, plaintiff will

⁸ Ohio Rev. Code § 2317.07. Plaintiff could also take the deposition of the servant as an adverse party, and propound interrogatories to him.

presumably have to offer some evidence tending to show that he is such an employee, and the court must make a preliminary ruling as to the sufficiency of such evidence, before the plaintiff may utilize section 2317.52. Thus the statute may not be available to plaintiff when he needs it most. Therefore, since the plaintiff in some cases may be uncertain whether he will be permitted to utilize section 2317.52 at the trial, he may prefer to join the servant as a co-defendant, thus making it possible to call him as an adverse party to testify as upon cross-examination under the general cross-examination statute, Ohio Revised Code section 2317.07, and to take his deposition and proposed interrogatories to him as an adverse party.

Occasionally, there may be other motives for joinder of master and servant.

PRESENT RULE AS TO JOINDER

The present rule in Ohio is that the master and servant may not be joined as defendants, if the master's liability is based solely on *respondeat superior*. If they are so joined and this fact appears on the face of the petition, a demurrer to the petition on the ground of misjoinder of defendants should be sustained.

The origin of the Ohio rule may be found in the Massachusetts case of *Parsons v. Winchell*,⁹ in which the court said:

The question to be decided is, whether this action on the case, brought against the owners of horses and a carriage, and their servant, the driver, jointly can be maintained for an injury done by the negligent driving of the servant, in the absence of the owners. We are of the opinion that it cannot. . . .

To maintain an action against two or more jointly, the plaintiff must show a joint cause of action. In an action *ex delicto*, the act complained of must be the joint act of all the defendants, either in fact, or in legal intendment and effect. In trespass, all are principals, and he who commands a trespass to be committed, though absent when it is committed, is regarded as a trespasser, and may be sued alone, or jointly, with him who obeyed his command. . . . But the act of a servant is not the act of the master, even in legal intendment or effect, unless the master previously directs or subsequently adopts it. In other cases, he is liable for the acts of his servant, when liable at all, not as if the acts were done by himself, but because the law makes him answerable therefor. He is liable, says Lord Kenyon, "to make a compensation for the damage consequential from his employing of an unskillful, or negligent servant," 1 East 108. The servant also is answerable to the party injured by his acts done as a servant, and is answerable to the master for any damages which the master may be compelled to pay for his wrongful acts, unless those acts were directed by the master. But if the master and servant were jointly liable to an

⁹ 59 Mass. 592, 5 Cush. 592 (1850).

action like this, the judgment and execution would be against them jointly, as joint wrongdoers, and the master, if he alone should satisfy the execution, could not call on the servant for reimbursement, nor even contribution. . . .

In 1853, Ohio enacted the Code of Civil Procedure. It contained section 35 (now Revised Code section 2307.19), which provides:

Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of a question involved therein.

It might be thought that the Ohio courts would have looked to this statute in determining questions as to joinder of defendants, including the problem of joinder of master and servant, and would have held that the statute authorizes joinder of master and servant. However, the Ohio courts, like the courts of some other code states, ignored this statute and continued to apply the common law rules of joinder. In *Clark v. Fry*¹⁰ the problem of joinder of master and servant was referred to for the first time after the enactment of the Code of Civil Procedure. The Ohio Supreme Court failed to mention the statute, and in its syllabus repeated (in a dictum) the common law rule as stated in the Massachusetts case:

Where, however, the rule of *respondeat superior* does apply, the action cannot be maintained jointly against the principal and the agent, the former, in case of recovery against him, having a right of action against the latter for his loss resulting from the wrongful act.

The court also stated in its opinion:

This doctrine was expressly ruled in *Parsons v. Winchell*, 5 Cush. 592; and it appears to rest upon a reason which is entirely satisfactory.

Wyoming, a state which borrowed the Ohio code of civil procedure to a large extent, held that the same joinder statute permitted joinder of master and servant.¹¹ In *Stanolind Oil and Gas Co. v. Bunce*,¹² the Supreme Court of Wyoming rejected the argument that it should follow the decision of the Ohio Supreme Court in *Clark v. Fry*¹³ as an authoritative interpretation of the joinder statute because that case was decided before Wyoming adopted its code of civil procedure which was in large measure borrowed from that of Ohio. The Supreme Court of Wyoming stated in part:

¹⁰ 8 Ohio St. 358 (1858).

¹¹ This is pointed out in the excellent note, "Joinder, in Ohio, of Persons Primarily and Secondarily Liable for Torts," 19 U. of Cin. L. Rev. 358, 373 (1950).

¹² 51 Wyo. 1, 62 P.2d 1297 (1936).

¹³ *Clark v. Fry*, *supra* note 10.

But an examination of the opinion rendered in *Clark v. Fry*, *supra*, in 1858, would appear to show that the disposition of the point at that time was not directed by a consideration of the statute in question, but through reliance upon the earlier decision of *Parsons v. Winchell*, 5 Cush. (Mass.) 592, 52 Am. Dec. 745, the Ohio court saying that this doctrine in that case ruled "appears to rest upon a reason which is entirely satisfactory." A perusal of the opinion in the cited Massachusetts case makes it quite clear that the reason referred to was that under the technical forms of actions at that time in that jurisdiction, the liability of the employer should under the respondeat superior rule be properly invoked by an action on the case, while the liability of the servant required an action of trespass for its enforcement, and the two might not be united. . . .¹⁴

Later Ohio cases followed the dictum in *Clark*. In *French v. Construction Co.*,¹⁵ the Ohio Supreme Court said:

It is, and since the decision by this court of *Clark v. Fry*, 8 Ohio St. 358, has been, the settled rule and law in this state that a joint action cannot be maintained against master and servant, in any case where the master's liability for the wrongful and negligent act of the servant arises solely and only from the legal relationship existing between them under the rule of respondeat superior, and not by reason, or because of, the master's personal participation in such wrongful or negligent act.

By 1940, the Ohio Supreme Court had characterized the servant and master as "primarily liable" and "secondarily liable" respectively, and had similarly characterized certain other related tortfeasors. It used the terminology of primary and secondary liability in *Losito v. Kruse*.¹⁶

In such case [tortfeasors who are primarily and secondarily liable] there can be no joinder in a single action of the party primarily liable and the party secondarily liable because there is no joint liability. If they are joined in an action and this relationship appears on the face of the petition, it is demurrable for misjoinder of parties defendant.

The Ohio Supreme Court used the primary and secondary liability terminology again in *Meyer v. Cincinnati Street Ry. Co.*:¹⁷

For nearly one hundred years the courts of Ohio have struggled with the problem of proper joinder of defendants under the above-

¹⁴ Apparently *Meyer v. Cincinnati Street Railway*, 157 Ohio St. 38, 104 N.E.2d 173 (1952), decided almost a century after the adoption of the Code of Civil Procedure, was the first Supreme Court opinion to refer to the predecessors of Ohio Rev. Code § 2307.19 in connection with joinder of defendants in tort actions. See the quotation from *Meyer* in the text following note 17, *infra*.

¹⁵ 76 Ohio St. 509, 81 N.E. 751 (1907).

¹⁶ 136 Ohio St. 183, 187, 24 N.E.2d 705 (1940).

¹⁷ 157 Ohio St. 38, 42, 104, N.E.2d 173 (1952).

quoted provision of the Code [now R.C. 2307.19, *supra*]. It has quite definitely established that joinder is not permitted where one of the defendants would be primarily liable and the other secondarily liable and this prohibition extends to those to whom the rule of respondeat superior applies and where the liability of one of the defendants would arise exclusively from the application of that rule.

In *Shaver v. Shirks Motor Express Corp.*,¹⁸ the court said:

Under the doctrine of respondeat superior, the agent or servant is primarily liable for his negligence, and his principal or master is secondarily liable therefor.

However, even in Ohio, if the liability of the master is not based solely upon *respondeat superior*, and the defendants are alleged to be concurrent tortfeasors, the master and the servant may be joined. Thus, in *Kaiser v. Rodenbaugh*,¹⁹ the court overruled a demurrer on the ground of misjoinder of defendants, stating in part:

The petition sets up the fact that Rodenbaugh and Wilson are master and servant respectively, but also sets forth—"The defendant Rodenbaugh was also negligent in respect to employing said defendant Wilson to operate said motor vehicle, because said Wilson was an incompetent driver, which fact was known to the defendant Rodenbaugh—etc."

In the court's opinion these allegations bring the case, as far as the petition is concerned, within the rule of *Wery v. Seff et al.*, 136 Ohio St. 307, 25 N.E.2d 692, and the allegations as to master and servant do not change the situation.

However, if on trial the plaintiff shows no negligence on the part of the master Rodenbaugh, except through his relationship to the servant Wilson, as Wilson's master, . . . plaintiff would then and there be compelled to elect as to which one he would pursue.

Such a ruling may lead to abuses, but I see no way of preventing it in view of the *Wery v. Seff* decision.²⁰

Ohio appears to be one of the last states to cling to the rule that master and servant cannot be joined. The Restatement of Agency²¹ states flatly that "principal and agent can be joined in an action for a wrong resulting from the tortious conduct of an agent or that of an agent and principal, and a judgment can be rendered against each."²²

¹⁸ 163 Ohio St. 484, 494, 127 N.E.2d 355 (1955).

¹⁹ 33 Ohio Op. 196, 68 N.E.2d 239 (C.P. 1946).

²⁰ *Cf. McCullough v. Miller*, 31 Ohio L. Abs. 271, s. c. rehearing 31 Ohio L. Abs. 402 (App. 1940).

²¹ § 217(B).

²² The comment to this section states in part:

"At a time when distinctions between actions of trespass and actions on the case were important, the courts in some states held that a master and a servant could not

A Comment note on the question of the right to join master and servant²³ states:

Since the annotation in 98 ALR 1057 [published in 1935], there has been a marked swing toward the procedural rule allowing the joinder of a master and his servant where the master's liability rests upon the doctrine of *respondeat superior*, and the rule permitting joinder is now recognized by a great majority of the courts.

The courts of other states have recognized that the trespass-case problem ceased to be a valid objection to the joinder of master and servant when the common law forms of action were abolished.

It is hoped that the Ohio Supreme Court will permit the joinder of master and servant by overruling *Clark v. Fry*,²⁴ *French v. Construction Co.*,²⁵ and the later cases following them.²⁶ The Supreme Court of Vermont emphatically overruled older cases in which it had denied the right to join master and servant. In *Daniels v. Parker*²⁷ it thoroughly explored the history of the rule of forbidding joinder and found that the reasons for this rule were no longer valid. It accordingly held that master and servant may be joined in Vermont. It is true that a decade ago in *Meyer v. Cincinnati Street Railway*,²⁸ the Ohio Supreme Court stated:

It has been quite definitely established that joinder is not permitted where one of the defendants would be primarily liable and the other secondarily liable and this prohibition extends to those to whom the rule of *respondeat superior* applies and where the liability of one of the defendants would arise exclusively from the application of that rule.

However, this statement was only dictum, as the actual holding of the case was that the defendants could be joined as concurrent tortfeasors; the problem of joinder of master and servant was not presented. Furthermore, the opinion in *Meyer* did refer to the joinder statute, now Ohio Revised Code section 2307.19, in considering

be joined in an action for the negligence of a servant if case [trespass] was the proper form of action against the servant and the master could be held liable only in an action on the case. These procedural minutiae have now largely disappeared, and with almost no exception the two persons can now be joined in one action for any tort committed by an agent for which the master or other principal is liable."

²³ 59 A.L.R.2d 1066 (1958).

²⁴ *Supra* note 10.

²⁵ *Supra* note 15.

²⁶ It has already greatly broadened the right to join concurrent tortfeasors in the successive cases of *Wery v. Seff*, 136 Ohio St. 307, 25 N.E.2d 692 (1941), *Meyer v. Cincinnati Street Railway*, 157 Ohio St. 38, 104 N.E.2d 173 (1952), and *Schindler v. Standard Oil Co.*, 166 Ohio St. 391, 143 N.E.2d 133 (1957).

²⁷ 119 Vt. 348, 126 A.2d 85 (1956).

²⁸ 157 Ohio St. 38, 104 N.E.2d 173 (1952).

whether the defendants were properly joined. It is therefore to be hoped that if the question of joinder of master and servant were again presented to the supreme court, it would consider Revised Code section 2307.19 as having relevance to that question, and that it would hold that joinder of master and servant is proper under the statute.

If the Ohio Supreme Court does not overrule the cases denying the right to join master and servant, legislation should be enacted explicitly authorizing such joinder.²⁹

JOINDER OF MASTER AND SERVANT IN FEDERAL COURT

When the Federal Rules of Civil Procedure were formulated, the draftsmen were well aware of the shortcomings of the permissive party joinder provisions in the Field code. To a considerable extent, the failure of the courts to give effect to those provisions was due to their vague, almost cryptic language. The draftsmen of the Federal Rules accordingly drafted joinder provisions which were much more explicit. Thus, Rule 20 of the Federal Rules of Civil Procedure provides in part:

All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action.

It is clear that under this provision master and servant may be joined in federal court, even though the master's liability is based solely on *respondeat superior*. Rule 20 was so interpreted in *Bailey v. Zlotnick*,³⁰ by Judge Rutledge (later Mr. Justice Rutledge):

It is also urged that *Knox v. Redwine*, 1932, 61 App. D.C. 179, 59 F.2d 304, prohibits the joining of principal and agent for the same cause of action, where the former's liability is predicated solely upon the agency. This was the rule formerly prevailing in this jurisdiction. It has been changed as to the District Court by the Federal Rules of Civil Procedure. Rule 20(a). They have not of their own force changed the former rule of joinder for the Municipal Court. But it would be unfortunate to continue for the court of limited jurisdiction and general informal procedure a technical rule of joinder now abolished for the District Court. The basis for the rule of *Knox v. Redwine* was that the action against the agent sounded in trespass on the case. The rule was

²⁹ In 1946, the Judicial Council of Ohio mailed a questionnaire to each member of the bar of Ohio. It included the question, "Are you in favor of joinder of actions against master and servant?" The response was: "Yes," 674; "No," 265; "No Opinion," 63. 8th Report of the Ohio Judicial Council, Appendix A, 27 (1947).

³⁰ 133 F.2d 35 (C.C.A., Dist. of Columbia, 1942).

adopted when the forms of action under the common law had not been abolished. They have now disappeared for the District Court, and we do not understand that they have ever prevailed in the Municipal Court. If, therefore, *Knox v. Redwine* ever was properly applicable to its procedure, it should be so no longer. The joinder was not improper.

Rule 20 was similarly interpreted by the U.S. District Court for the Southern District of Ohio.³¹ The court's order stated in part:

This cause came on to be considered upon the motion of defendant, Walter Beachler, for an order requiring the plaintiffs to elect as to which defendant this action shall proceed against, that is, The United Fireworks Manufacturing Company, a corporation, or Walter Beachler, President of the defendant corporation.

If this were an Ohio state court, the defendant's motion would be well taken.

However, since this is a Federal District Court the procedural laws of Ohio are not controlling. A careful reading of Rule 20 of the Federal Rules of Civil Procedure is dispositive of this motion. . . .

In accordance with the foregoing, it is therefore ordered that defendant's motion should be and it hereby is denied.

It is submitted that the two federal court decisions are correct. The question of joinder of master and servant is a purely procedural question, and therefore should be governed by the Federal Rules. *Erie Railroad Co. v. Tompkins*,³² even as extended by the "outcome-determinative" test,³³ surely does not require a federal court sitting in Ohio to apply the Ohio rule forbidding joinder of master and servant. The procedural problem of joinder of master and servant must not be confused with the substantive problem of the master's right of indemnity against the servant.³⁴ Obviously, *Erie* requires a federal court in a diversity case to apply the applicable state law with respect to indemnity. If master and servant are joined in federal court under Rule 20, the master may assert a cross-claim against the servant for indemnity under Rule 13 (g), which provides in part:

³¹ Donald E. Lehmer and Barry S. Lehmer v. United Fireworks Mfg. Co., a corporation, et al., Case No. 2504, U.S. District Court for the Southern District of Ohio, Western Division, at Dayton. Order filed April 7, 1961, by Weinman, J.

³² 304 U.S. 64 (1938).

³³ The outcome-determinative test is employed in *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), *Ragan v. Merchants Transfer & Warehouse Co., Inc.*, 337 U.S. 530 (1949), and other cases. The test has been strongly criticized in Gavit, "States Rights and Federal Procedure," 25 Ind. L.J. (1949), and in other articles. *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958), indicates that the Court may be inclined to retreat somewhat from the extreme applications of the outcome-determinative test.

³⁴ *Supra* note 5.

Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

But the existence of the substantive right of indemnity, and the fact that *Erie* would require the federal court in a diversity case to apply the state substantive law with respect to indemnity, have nothing whatever to do with the purely procedural problem of joinder of master and servant in federal court. That is to be determined by applying Federal Rule 20.

THE MASTER'S RIGHT OF INDEMNITY AGAINST THE SERVANT
IS NOT A VALID OBJECTION TO JOINDER

One of the reasons advanced against permitting joinder of master and servant is that this would prevent enforcement of the master's right of indemnity against the servant. This reason was advanced by the Supreme Judicial Court of Massachusetts in *Parsons v. Winchell*:³⁵

But if the master and servant were jointly liable in an action like this, the judgment and execution would be against them jointly, as joint wrongdoers, and the master, if he alone should satisfy the execution, could not call on the servant for reimbursement, nor even for contribution.

This reason was less explicitly stated by the Ohio Supreme Court in *Larson v. Cleveland Railway Co.*:³⁶

In cases where there is such primary and secondary liability for the identical wrong, the party who is secondarily liable has a right of indemnification from the party primarily liable, in case the former is obliged to respond in damages. He would lose such right if joinder is permitted, since in the absence of statute, there is no right of indemnification or contribution as between joint tortfeasors who are in *pari delicto*.

This argument deserves careful consideration as procedural rules exist solely for the purpose of facilitating the enforcement of substantive rights, and a rule of procedure which would prevent the enforcement of a substantive right could not be tolerated.

It is impossible to sustain or refute the argument by Ohio decisions. The actual question apparently arises infrequently, if at all, in Ohio. In the first place, the master seldom attempts to enforce his right of indemnity against the servant. Policies of liability insurance carried by the master often protect the servant as well. And even when the servant is not protected by the master's liability insurance policies,

³⁵ *Supra* note 9.

³⁶ 142 Ohio St. 20, 50 N.E.2d 163 (1943).

there are often considerations which make it inadvisable for the master to assert his right of indemnity against the servant. In the second place, this argument is simply a hypothetical argument against permitting joinder of master and servant; it is not a statement of the holding in an actual case. The courts adopting this argument use it as a justification for refusing to permit joinder. Having thus refused to permit joinder, there is no opportunity later on to test the correctness of the argument. In the few Ohio cases in which the defendant master did not raise the objection of misjoinder,³⁷ he apparently had no intention of asserting his right of indemnity against his co-defendant servant.

Since the argument that permitting joinder of master and servant would destroy the right of indemnity is a purely hypothetical argument, at least so far as Ohio case law is concerned, it can be tested only by an analysis of the assumptions upon which it is based. The argument makes some assumptions which have not been explicitly stated. A full statement of the argument might be as follows:

If joinder of master and servant were permitted, when the liability of the master is based solely upon *respondeat superior*, a verdict in favor of the plaintiff will necessarily be a single joint verdict against both defendants, in the sum of X dollars. Likewise, the judgment will necessarily be a single joint judgment against both defendants, in the sum of X dollars. There could be no indication in the judgment entry that the defendants had not been determined to be concurrent tortfeasors. Therefore, if the master should bring a subsequent action against the servant for indemnity, the joint judgment would be a complete defense, as it would be a conclusive adjudication that the plaintiff and defendant (in the subsequent action) were concurrent tortfeasors.

It is submitted that some of these assumptions are incorrect.

If joinder of master and servant were permitted in Ohio, either by judicial decision or by legislation, this would be merely a procedural change. It would not affect the substantive law. Therefore, if master and servant were properly joined under such a procedural rule, the procedure in the action should be shaped to conform to the substantive rules, not to frustrate them. Thus, if the evidence shows that the only possible basis of liability of the defendant master is *respondeat superior*, and if the plaintiff does not voluntarily dismiss as to the defendant servant,³⁸ the court should (if a party so requests) submit to the jury, along with forms for verdicts in favor of the defendants, a form of general verdict in favor of

³⁷ E.g., *Young v. Featherstone Motors*, 97 Ohio App. 158, 124 N.E.2d 158 (1954), and *Sylvania Development Co. v. Start*, 25 Ohio App. 411, 158 N.E. 206 (1927).

³⁸ For tactical reasons, the plaintiff would probably voluntarily dismiss as to the defendant servant, in many cases. See text preceding note 104, *infra*.

the plaintiff against the defendant servant and a separate form of general verdict against the defendant master. If a special verdict is requested, it will accomplish the same purpose. If the jury returns a verdict against each defendant (which should be in the same amount), the judgment entry should contain two several judgments in the same amount, one against the defendant master and one against the defendant servant. It should also contain findings making it clear on the face of the judgment entry that the several judgments are for the same injury, and that the plaintiff is therefore entitled to but one satisfaction. It might also contain an express reservation to the effect that no issues were raised or determined between the defendants.³⁹ Such procedure appears to be permissible under present Ohio practice. Courts may submit as many forms of verdict as are required by the issues in a case. The forms of judgment are no longer rigidly limited as they were under the common law procedure in effect in Massachusetts in 1850.⁴⁰ The Field Code of Civil Procedure which became the law in Ohio in 1853 contained a provision which is now Revised Code section 2323.02:

Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants. By the judgment, the court may determine the final rights of the parties on either side, as between themselves, and grant to the defendant any affirmative relief to which he is entitled.⁴¹

Thus it appears that permitting joinder of master and servant would not of itself destroy the right of indemnity. In the rare case in which the plaintiff insists on going to the jury against both defendants *and* the master is concerned about preserving his right of indemnity, the master may accomplish this by insisting on the submission of proper forms of verdict, and on the proper form of

³⁹ If there is evidence tending to prove personal fault on the part of the master, in addition to liability under *respondeat superior*, an additional form of verdict should be submitted to the jury for a joint verdict against both defendants. If the jury returns such a joint verdict, then an ordinary single joint judgment should be rendered against both defendants.

⁴⁰ See text following note 35, *supra*.

⁴¹ It might also be thought desirable to permit the defendant master to assert, in the same action, a counterclaim or cross claim against the servant for indemnity, as is permitted by Rule 13(g) of the Federal Rules of Civil Procedure. See text following note 34, *supra*. This is apparently not possible under present Ohio law.

It might also be thought desirable to permit a master who is sued as sole defendant to implead his servant in the same action as a third party defendant, for the purpose of asserting his right of indemnity against the servant. This is permitted by Rule 14 of the Federal Rules of Civil Procedure. This is apparently not possible under present Ohio law.

These matters are outside the scope of this article.

judgment entry. The objection may be made that the charge and the verdict forms would be confusing to the jury. However, it is the plaintiff who is most likely to be hurt by the possible confusion, and he is bringing it on himself by going to the jury against both master and servant. He can avoid the possible confusion by voluntarily dismissing as to the servant in the usual case where he has adequate evidence of agency. It may be anticipated that he would thus voluntarily dismiss as to one defendant in most cases.⁴² Ordinarily, joinder of master and servant will have served its purpose before the case is submitted to the jury, and the plaintiff will prefer to go to the jury against the master alone.

TEMPORARY AVOIDANCE OF OHIO RULE AGAINST JOINDER OF MASTER AND SERVANT

The lingering Ohio rule forbidding joinder of master and servant is an anachronism—a holdover rule from the common law forms of action.⁴³ There are situations where it is very desirable from the plaintiff's point of view to join master and servant.⁴⁴ If the Ohio rule forbidding joinder of master and servant were rigidly enforced, a plaintiff might be seriously handicapped in some cases. Therefore, one may wonder why the lawyers and courts in Ohio have tolerated this outmoded rule for so long.

In attempting to answer this question, it should first be pointed out that a plaintiff seldom wishes to recover a judgment against both master and servant, or even to go to the jury against both. In most cases, if he has satisfactory proof of the agency relationship, he will prefer to go to the jury against the master alone. Usually nothing would be gained by getting an additional judgment against the servant for the same injury, and it might be less desirable from a tactical point of view to go to the jury against both the master and the servant. In most cases, the tactical needs of the plaintiff will be satisfied if he may join master and servant as co-defendants when he commences the action and proceed against them both up to the conclusion of the evidence. If he is permitted to do this, he may take the deposition of the servant as an adverse party under Ohio Revised Code section 2317.07,⁴⁵ he may propound interrogatories to the servant under Revised Code sections 2309.43 or 2317.07, and at the trial, during the presentation of his evidence, he may call the defendant servant to the stand to testify as upon cross-examina-

⁴² See text preceding note 104, *infra*.

⁴³ See text following note 9, *supra*.

⁴⁴ See text preceding note 8, *supra*.

⁴⁵ See text preceding note 8, *supra*.

tion, under the latter statute. At the conclusion of the evidence, if the proof of agency is adequate, he will ordinarily be perfectly willing to go to the jury against the master alone; in fact, he may prefer to do so.⁴⁶ Thus, it appears that to a very considerable extent the needs of the plaintiff will be satisfied if he may proceed against both master and servant up to the conclusion of the evidence, even though he is not permitted to do so beyond that point.

This appears to be the present practice, at least in many counties in Ohio. This accommodation between the Ohio rule forbidding joinder of master and servant on the one hand, and the tactical needs of the plaintiff on the other, has been accomplished by means of a method of pleading which has been employed by many plaintiffs.

Even though the only probable basis of liability against one defendant (the master) is *respondeat superior*, the plaintiff does not necessarily disclose this fact in his petition. Instead, he often simply alleges that "defendants" committed the tort complained of. Since a demurrer to a petition is effective only when the defect "appears on its face,"⁴⁷ plaintiff's petition is not subject to demurrer for misjoinder of parties defendant. Thus, the following appears in the statement of facts in *Moherman v. Nickels*:⁴⁸

The plaintiff knew that the defendant, Harry Donley, was the sole operator of the truck at the time of the accident but made Alfred Nickels, doing business as Nickels Bakery, a party defendant on the assumption that Donley was operating the truck as an employee of Nickels and within the scope of his employment at the time of the accident. The plaintiff in his petition, however, alleged that "the defendants . . . negligently and carelessly operated said truck to their left of the center of said road, and into and against the automobile which plaintiff was driving, with great force and violence," so that the petition was not demurrable for misjoinder of parties defendant.

It is probable that similar wording was employed in plaintiff's petition in *French v. Construction Co.*,⁴⁹ wherein the court stated:

It is, however, suggested in argument by counsel for [plaintiff] that the misjoinder of parties defendant . . . should have been taken advantage of by demurrer in the court of common pleas. . . . The answer to this is, that the fact of misjoinder does not affirmatively appear on the face, or from the allegations, of plaintiff's petition, but such fact was, for the first time, disclosed by the evidence which was introduced on behalf of the plaintiff.

⁴⁶ See text preceding note 104, *infra*.

⁴⁷ Ohio Rev. Code § 2309.08.

⁴⁸ 140 Ohio St. 450, 452, 45 N.E.2d 405 (1942).

⁴⁹ 76 Ohio St. 509, 81 N.E.751 (1907).

Similar wording may be found in many petitions filed in the Ohio courts. If the defendant is not successful in attacking this method of pleading by motion,⁵⁰ the plaintiff will be able to employ discovery procedures against the defendant servant as an adverse party prior to the trial.⁵¹ At the trial, during the presentation of plaintiff's evidence, he may call the defendant servant to the stand to testify as upon cross-examination. Evidence that the defendant who personally committed the tort was the servant of the other defendant and that he was acting within the scope of his employment when he committed the tort is admissible under the allegation in the petition that "defendants" committed the tort, since, as previously pointed out,⁵² such proof is not a variance from the allegation that the master committed the tort. At the conclusion of the evidence, if the only possible basis of liability of one defendant is *respondeat superior*, the defendant can compel the plaintiff to elect between the two defendants.⁵³ But by that time the plaintiff has often accomplished his purposes and is perfectly willing to elect.

MOTION TO PETITION

Because this method of pleading is frequently effective in accomplishing plaintiff's tactical objectives, defendants have understandably attempted various forms of attack upon what appears to them to be an evasion of the Ohio rule that master and servant may not be joined. An attack by special demurrer will be unsuccessful.⁵⁴ Defendants have filed motions to make such allegations definite and certain. If such a motion is sustained, the amended petition of the plaintiff may disclose that plaintiff's only claim of liability against one defendant is that he is liable under *respondeat superior* for the act of the other defendant, his servant. If so, the amended petition is subject to special demurrer.

Probably the first reported decision on such a motion was *Davis v. Montei*,⁵⁵ decided by the Court of Appeals of Franklin County. Plaintiff alleged, among other things, that "defendants" were operating a Buick automobile; that defendant Louis L. Montei was the father of defendant Thomas Montei, a minor fifteen years of age; that defendant Louis L. Montei was the owner of the Buick and negligently entrusted it to the minor defendants for them to

⁵⁰ Such attacks will be discussed in the text following note 54, *infra*.

⁵¹ See text accompanying note 45, *supra*.

⁵² See text accompanying notes 6 and 7, *supra*.

⁵³ See text preceding note 99, *infra*.

⁵⁴ See text accompanying notes 48 and 49, *supra*.

⁵⁵ 38 Ohio L. Abs. 147, 49 N.E.2d 584 (App. 1942).

operate. Defendants moved, among other things, for an order requiring plaintiff to make the petition more⁵⁶ definite and certain by stating (a) which defendant plaintiff claims had actual physical control of the Buick automobile; (b) the relationship claimed by plaintiff to exist between each defendant; (c) if it is claimed that a joint enterprise existed, by stating the facts to show such joint enterprise. The trial court sustained the motions, stating in the journal entry:

The court finds that said motion is well taken in that: but one person can operate a car, and that in the defendant's car were minors and in order to hold the occupants of the defendant's car liable with the operator, it would be necessary to show a common enterprise or agency.

Upon plaintiff's refusal to amend, the trial court dismissed his petition, and plaintiff appealed. The court of appeals reversed, stating in part:

We are inclined to think that it is incorrect to say that only one person can operate a car. We can agree that this would be the correct method of operation, but it is physically possible for more than one to participate in the operation. For obvious reasons we refrain from giving examples of how two, three or four persons might all be actually participating in the physical operation of the automobile. These very acts of multiple operation would probably be negligence within themselves. The detail of alleging which one performed the various acts which constituted the operation, would be evidential. We will venture the guess that the plaintiff would probably find it impossible to produce the evidence supporting his allegations of multiple operation, but as a matter of pleading we do not think it defective, particularly when we find that such a situation is possible. . . .

We are constrained to the view that the trial court was in error in dismissing plaintiff's petition. It is highly probable that plaintiff would have difficulty in presenting proof. If and when that time comes, the Court can dismiss as to other defendants against whom no evidence is presented, or require an election if a state of facts is such that joint action may not be prosecuted.

The cause is remanded with instructions to reinstate the case and permit the filing of further pleadings within rule. . . .

The court stated expressly that it was not basing its conclusions on the theory of joint enterprise. However, it observed that "there is very serious doubt as to whether or not the facts of a joint enterprise are required to be pleaded, where there is the allegation of joint

⁵⁶ The use of the adverb "more" in such a motion has been criticized. See *Brown v. Bray*, 16 Ohio C.C.N.S. 165, 41 Ohio C.C. 468 (1909). The criticism seems to the writer to be captious.

operation." The writer interprets this to mean that evidence of a joint enterprise could probably be admitted under the simple allegation that "defendants" were operating.

In *Hardware Mutl. Ins. Co. v. McGinnis*,⁵⁷ plaintiff alleged that "defendants" were operating a motor vehicle. Defendants filed a motion, one branch of which sought to have the petition made definite and certain by requiring plaintiff to state therein:

- I. The relationship it claims between the two defendants.
- II. Which of the defendants it claims was driving the motor vehicle.

The court overruled this motion on the authority of *Davis v. Montei*.

In *Sharkey v. Lathram*,⁵⁸ decided by the Court of Common Pleas of Clermont County, plaintiff alleged that "defendants" were operating a truck. Defendants filed a motion "to require the Plaintiff to make [his] . . . Petition definite and certain by stating who was actually driving the truck mentioned . . . and what connection the Defendants, and each of them, had with the actual driving and operation of said truck."

The court refused to follow *Davis v. Montei*, and sustained defendants' motion. The extensive opinion is devoted largely to joint adventure. The court did not discuss the possibility of multiple physical operation, which was the express basis of the holding in *Davis v. Montei*. The court condemned plaintiff's petition as a "shot-gun petition":

A "shot-gun petition" leads to careless and inexact preparation for trial, and if such is allowed, neither the defendants nor the court know what is the claim of the plaintiff, under such style of pleading—does the claim come under the laws relating to partnership, principal and agent, master and servant, independent contractor, debtor and creditor, bailor and bailee, joint tortfeasors, or joint adventure? . . .

A client deserves exact thinking from his counsel, and exact thinking comes with and from properly pleaded and carefully drawn pleadings, by counsel on each side.⁵⁹

This court is of the opinion that the petition in each of the three instant cases fails to set out sufficient facts to show a joint adventure, if that is the true situation that counsel for plaintiffs intended

⁵⁷ 68 Ohio L. Abs. 390, 54 Ohio Op. 42, 119 N.E.2d 698 (C.P. 1954).

⁵⁸ 80 Ohio L. Abs. 359, 156 N.E.2d 502 (C.P. 1959).

⁵⁹ It is respectfully submitted that the court, by its ruling, is requiring much more than exact thinking from plaintiff's counsel. It is requiring counsel, without the benefit of cross-examination of the driver, to commit himself in the petition to a particular theory as to the legal relationship existing at the time of the accident between the driver and other persons or corporations. Usually the evidence as to this relationship is not within the control of the plaintiff. As to the fallacious "theory of the case" requirement, see note 64, *infra*.

to plead, neither do the petitions show joint liability of joint-tortfeasors, in any way.

In *Costilow v. Cunningham*⁶⁰ plaintiff alleged that "defendants" were operating an automobile. A "motion, or in the alternative, a demurrer" was filed to plaintiff's petition by defendant Folk Chevrolet, Inc., the demurrer being based upon the ground of misjoinder of parties defendant. The trial court treated the paper as a demurrer asserting a misjoinder of parties, sustained the demurrer, and upon the refusal of plaintiff to plead further, dismissed plaintiff's action without prejudice. Plaintiff appealed, and the court of appeals reversed, stating in part:

As we read the amended petition, there nowhere appears on its face any allegation that the defendants occupied the relationship of master and servant or of principal and agent.

It is entirely conceivable that the corporate defendant, through its agent or servant, acting within the scope of his authority, could jointly operate said automobile with the defendant Cunningham.

That, in our opinion, was the intendment of the allegations of the amended petition.

We are not in accord with the argument of the appellee that "If it is conceded that a corporation can do a physical act only through an agent, and if plaintiff alleges that the corporation was doing a physical act along with Larry B. Cunningham, it follows that Larry B. Cunningham must have been the agent through which the corporation was performing such physical act."

To us, that statement presents a non sequitur.

The relationship of master and servant, or of principal and agent, not appearing from the allegations of the amended petition, the court may not inquire beyond the face of the petition to ascertain such relationship.

The sustaining of the demurrer on the ground of misjoinder of parties defendant was erroneous, and the dismissal of plaintiff's amended petition was prejudicially erroneous.

While the trial court treated the combined motion and demurrer as a demurrer, the reasoning of the court of appeals is also applicable to a motion to make definite and certain.

In *Shrewsberry v. Wilson*,⁶¹ decided by the Court of Appeals of Champaign County, plaintiff alleged that "Defendants Fred C. Wilson and Fruit Belt Motor Service Inc. were operating their tractor-trailer truck." Defendants moved that the plaintiff be required to make the petition definite and certain by setting forth the

⁶⁰ *Ruth C. Costilow v. Larry B. Cunningham and Folk Chevrolet, Inc.*, a corporation, Summit County Court of Appeals, No. 4593, March 28, 1956.

⁶¹ 113 Ohio App. 556, 179 N.E.2d 528 (1960).

acts of each of the defendants which constituted the operating of the tractor-trailer truck. Defendants also demurred to each and every interrogatory attached to plaintiff's petition. The trial court sustained both the motion and the demurrer, stating in part in its journal entry:

Until it appears by some allegation that the defendants are properly joined, and that a corporation and an individual can by some sort of mythical co-operation and simultaneous concert of action physically control the course and behavior of a motor vehicle, it would seem to the court that the submission of interrogatories would be premature.

If defendants are not properly joined, nor both liable, then one or the other can only be a witness, and since interrogatories are not a substitute for depositions the demurrer should be sustained.

Upon plaintiff's refusal to plead further, his petition was dismissed, and he appealed. The court of appeals held that the trial court did not err in sustaining defendant's motion to make definite and certain, but that it did commit prejudicial error in sustaining defendants' demurrer to plaintiff's interrogatories. Quoting from the opinion:

[T]he plaintiff relies heavily upon the case of *Davis v. Montei*, 38 Ohio Law Abs., 147, 49 N.E.(2d), 584. That case, however, is readily distinguishable on its facts from this case as disclosed by the following language therefrom, at page 150: . . .⁶²

But where, as here, one of the two named defendants is a corporation, the multiple operation of the tractor-trailer truck was clearly beyond the realm of possibility.⁶³

On what theory then is the plaintiff proceeding?⁶⁴

Does the plaintiff hold both defendants primarily liable for independent, coexisting acts of negligence resulting in the alleged injuries, or is the petition demurrable because the corporate defendant is only secondarily liable? The fact that answers to these questions

⁶² The court here quoted the language already quoted in the text preceding note 1, *supra*.

⁶³ The fallacy of this argument is pointed out in the text accompanying notes -90, *infra*.

⁶⁴ The requirement that a plaintiff proceed upon a particular theory is contrary the fundamental principles of code pleading. The requirement of a "theory of the case" is shown to be incorrect in Clark on Code Pleading, 259 ff. (2d ed., 1947), and notes, "The Objective and Function of the Complaint," 14 Vanderbilt L. Rev. 899, 1 ff. (1961). Although some lower courts in Ohio have been beguiled by the "theory of the case" or "theory of a pleading" doctrine, the Ohio Supreme Court has consistently refused to apply it. See *e.g.*, *Gartner v. Corwine*, 57 Ohio St. 246, 48 N.E. (1897); *Dick v. Hyer*, 94 Ohio St. 351, 114 N.E. 251 (1916), *Globe Indemnity Co. v. Wassman*, 120 Ohio St. 72, 165 N.E. 579 (1929); *Baccalieri v. Heath*, 158 Ohio St. 481, 110 N.E.2d 130 (1953); and *Bell v. Salvation Army*, 172 Ohio St. 326, 175 N.E.2d 738 (1961).

are not readily available by reference to the allegations contained in the plaintiff's petition serves to accentuate its defectiveness. When the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge is not apparent, the court may require the pleading to be made definite and certain by amendment. Section 2309.34, Revised Code. In exercising the discretion afforded by this statute, we are of the opinion that the trial court had ample justification here for sustaining the defendants' motion to make definite and certain. . . .

The fact that the pleading was subject to a motion to make definite and certain did not relieve the trial court of the duty to consider each interrogatory. In fact, some of the information sought thereby was peculiarly within the knowledge of the defendants and was essential in order to make the petition definite and certain. It has been held that the primary purpose of interrogatories appended to a pleading and required to be answered by an opposite party is to enable the interrogating party to properly plead his cause. . . .

As may be noted therefrom [Section 2309.43, Revised Code], a "perfect" pleading is not a condition precedent to the consideration of interrogatories. Nor do we find that the instant pleading is such as might warrant a blanket disposition of the interrogatories. The sole test upon demurrer is whether the interrogatories are "pertinent to the issue made in the pleadings." The trial court should, therefore, have applied this test to the interrogatories individually and ruled on each accordingly. In our opinion, its failure to do so constitutes prejudicial error.

A substantial number of Ohio trial courts consistently overrule such motions to make definite and certain. On the other hand, there are a number of rulings by Ohio trial courts sustaining such motions.⁶⁵ Opinions on such rulings are rarely reported, and it is therefore often difficult for counsel to predict the ruling of a particular trial court on such a motion.

In appraising the rulings on this question, it must first be emphasized that the problem cannot be considered as an isolated theoretical question. Pleading questions, like other legal questions are practical, not theoretical.⁶⁶ This must be emphasized, because

⁶⁵ Until quite recently, The Common Pleas Court of Franklin County had settled policy of overruling such motions, as in *Davis v. Monte*, *supra* note 55, decided by the Court of Appeals of Franklin County. However, a change in this policy is apparently indicated in an opinion sustaining a motion to make definite and certain *Upperman v. Freeman*, Case No. 213577, Common Pleas Court of Franklin County, Ohio, May 17, 1962.

⁶⁶ The often loosely used words "theoretical" and "practical" are here used in specific sense. "A theoretical question is one which seeks knowledge. . . . A practical problem is one which seeks not knowledge, but a course of action. Every practical question is of the form 'What *ought* to be done in some respect,' Every quest about a matter of law asks what ought to be done in some respect in the governm

we are often tempted to assume that the words of a pleading can be assigned to various categories, such as "conclusions of law," "ultimate facts," "evidential facts," "definite and certain," "not definite and certain," and so on, according to *logical* criteria. This assumption is incorrect. The rules as to the proper degree of particularity in the language of a pleading must be administered according to *practical* criteria.⁶⁷

Thus, when defendants move to make definite and certain allegations in plaintiff's petition that "defendants were operating a motor vehicle," etc., the question is not whether such allegations are "definite and certain" according to logical criteria, but whether it is desirable from the standpoint of fair and efficient judicial administration to force the plaintiff to so amend his petition so that he will be committed to a particular theory as to the identity of the driver and as to the legal relationship between the defendants.

Various functions are served by pleadings.⁶⁸ The two principal functions are (1) the formulation of the issues, and (2) giving notice of the claim to the opponent. As pointed out by Professor Cleary,⁶⁹

Pleadings need not be permitted to bog down in a mass of detail. The information given in a pleading should be designed to give direction and purpose to investigation and preparation, not to substitute for them. As details in pleadings increase, the hazards of variance increase in almost geometrical proportion. Moreover, there is a point at which the notice-giving function of pleadings collides with the issue-forming function.

It is easy to forget the issue-forming function of the pleadings and to expect detailed notice-giving from them. If, in a particular case, a petition is adequate for the formulation of the issues, but does not give sufficiently detailed notice to the defendant, ordinarily the desirable solution is for the court to permit discovery by the defendant, rather than to sustain a motion by the defendant to make the petition definite and certain, and thereby force the plaintiff to clutter up the petition with evidence which obscures the issues. Above all, a court should not, by sustaining a motion to make definite and certain, attempt to restrict

of a political society. Every such question is, therefore, a practical question." Michael, *The Elements of Legal Controversy*, 217-218 (1948).

⁶⁷ The absence of a clear, easily-drawn and "scientific" distinction between "statements of evidentiary facts," "statements of fact" and "conclusions of law" is pointed out in Cook, "Statements of Fact in Pleading Under the Codes," 21 Col. L. Rev. 416, 417 (1921). Cf. Morris, "Law and Fact," 55 Harv. L. Rev. 1303, 1340 (1942).

⁶⁸ Clark on Code Pleading, § 11 (2d ed., 1947); James, "The Objective and Function of the Complaint," 14 Vand. L. Rev. 899 (1961).

⁶⁹ Cleary, "The Uses of Pleading," 40 Ky. L.J. 46, 49 (1951).

a party to a particular theory of claim or defense.⁷⁰ To do so is to invoke the unsound "theory of a pleading" requirement, which is a regression to common law pleading.⁷¹ A party is not required to make evident in his pleading the rules of law upon which he relies. At the trial he should be given the benefit of any rules of substantive law which are applicable to the facts which he has pleaded and proved.

With these basic principles in mind, let us return to the problem presented when a defendant moves to make definite and certain an allegation in plaintiff's petition that "defendants operated a motor vehicle."

At the trial, such an allegation is treated as if it contained the following propositions, among others:⁷²

- (1) D-1 was physically operating the vehicle.⁷³
- (2) D-2 was physically operating the vehicle.⁷⁴
- (3) An unnamed person who was physically operating the vehicle was the servant of D-1, within the scope of his employment.⁷⁵

⁷⁰ In a multiple-defendant case in which the liability, if any, of one defendant is vicarious, the only apparent objective of the motion to make definite and certain is that of forcing the plaintiff to amend his petition so that it will be vulnerable to special demurrer under the anachronistic Ohio rule forbidding joinder of master and servant. If that rule should be abrogated, the number of motions to make this type of allegation definite and certain would probably drop to zero. In a single-defendant case, it would probably not occur to defense counsel to file a motion to make definite and certain an allegation that "defendant operated."

⁷¹ *Supra* note 64.

⁷² "... propositions are symbolized and expressed by ordinary language. What is commonly regarded as a single English sentence is frequently complex in that it symbolizes two or more propositions It should be noted that the distinction between sentences, which consist of words having certain grammatical relationships, and propositions, which consist of terms having certain logical relationships, must be made. A sentence is not affirmed or denied, but what the sentence symbolizes, one or more propositions as the case may be.

"Sentences and propositions are only analytically separable. A declarative sentence is not significant unless it symbolizes a proposition; a proposition cannot be held before the mind unless it is somehow symbolized. Despite this inseparability, the distinction between sentence and proposition is clear for anyone who knows that the same proposition can be symbolized by two or more sentences in the same language or in different languages, and that, because of the ambiguity of words, the same simple sentence often symbolizes two or more different propositions." Michael and Adler, "The Trial of an Issue of Fact: I," 34 Colum. L. Rev. 1224, 1247 (1934).

⁷³ Such an interpretation is permissible only if D-1 is a natural person.

⁷⁴ Such an interpretation is permissible only if D-2 is a natural person.

⁷⁵ This interpretation is permissible, *whether D-1 is a natural person or a corporation*, because of the legal rule (discussed in the text preceding note 6, *supra*), that proof that defendant's servant committed a tort is not a variance from an allegation that defendant committed the tort. The possibility of this interpretation was clearly recognized in *Costilow v. Cunningham*, *supra* note 60. The failure of the court to

(4) An unnamed person who was physically operating the vehicle was the servant of D-2, within the scope of his employment.⁷⁶

(5) D-1 was the servant of D-2, within the scope of his employment.⁷⁷

(6) D-2 was the servant of D-1, within the scope of his employment.⁷⁸

(7) D-1 and D-2 were joint adventurers.⁷⁹

A demurrer to the petition on the ground of misjoinder of defendants must be overruled. On demurrer, the court may look only to the face of the petition. The allegation is susceptible of the interpretation that it contains Propositions 1 and 2 (if both defendants are natural persons) or Propositions 1 and 4 (if D-1 is a natural person and D-2 is either a natural person or a corporation). Under either conjunction of propositions, D-1 and D-2 are concurrent tortfeasors, and as such may be joined as co-defendants.

If the case goes to trial on a petition containing the allegation that "defendants were operating a motor vehicle," etc., and an answer containing a general denial, evidence tending to prove one or more of the foregoing propositions may be admitted.

Evidence tending to prove that D-1 was physically operating is admissible because of the presence of Proposition 1 in the petition. If no evidence is admitted tending to prove either (a) that D-2 was physically operating (Proposition 2) or (b) that an unnamed person who was physically operating (either alone or with D-1) was the servant of D-2 (Proposition 4) or (c) that D-1 was the servant of D-2 (Proposition 5), a verdict will be directed in favor of D-2, and the case will go to the jury against D-1 alone.

perceive the possibility of this interpretation in *Shrewsberry v. Wilson*, *supra* note 61, is demonstrated by its incorrect statement that "but where, as here, one of the two named defendants is a corporation, the multiple operation of the tractor-trailer truck was clearly beyond the realm of possibility." A corporation can most certainly operate a vehicle through the instrumentality of an agent; in fact, this is the *only* way in which it can do so.

⁷⁶ See text accompanying notes 86-90, *infra*.

⁷⁷ This interpretation is clearly permissible if D-1 is a natural person.

⁷⁸ This interpretation is clearly permissible if D-2 is a natural person.

⁷⁹ The opinion in *Davis v. Monte*, quoted in the text following note 56, *supra*, indicates that such an interpretation is probably permissible. However, the opinion in *Sharkey v. Lathram*, quoted in the text following note 58, *supra*, indicates that such an interpretation is not permissible. In *Hardenbrock v. Waitman*, 56 Ohio L. Abs. 403, 92 N.E.2d 615 (C.P. 1949), and *King v. Corporation of Liberty*, 27 Ohio Ops. 407, 12 Ohio Supp. 147 (C.P. 1943), somewhat more explicit allegations were held to constitute a pleading of joint enterprise. In *Ford v. McCue*, 163 Ohio St. 498, 127 N.E.2d 212 (1955), the allegations in the petition as to joint enterprise (quoted in the opinion in *Sharkey v. Lathram*) were quite explicit.

If evidence is admitted tending to prove that D-1 was physically operating (Proposition 1), *and* that D-1 was the servant of D-2 (Proposition 5), a verdict should not be directed in favor of either D-1 or D-2 because evidence within the scope of the pleadings (specifically, within the scope of Propositions 1 and 5) has been admitted tending to show liability against each defendant.⁸⁰ However, under the present Ohio rule that master and servant cannot be joined,⁸¹ a motion to require plaintiff to elect as between D-1 and D-2 should be sustained because it now appears for the first time that the defendants were improperly joined.⁸² Upon the sustaining of such a motion, the plaintiff will presumably make an election, and the case will then go to the jury against one defendant.

Returning to the motion to make definite and certain, the contention of the defendant in support of that motion may be stated as follows: the petition is indefinite and uncertain for the very reason that it contains the various propositions set forth above. The plaintiff should be forced to state specifically whether either or both of the defendants was actually engaged in the physical operation of the vehicle. Furthermore, if the plaintiff does not allege that a particular defendant was actually engaged in the physical operation of the vehicle, he should be required to allege the facts by reason of which the plaintiff claims that such defendant is vicariously liable for the negligence of the actual driver.

Is this contention sound? Or is the petition, as it stands, sufficiently definite and certain to serve as a basis for the formulation of the issues and to give fair notice to the defendant of the plaintiff's claim? It is submitted that it is sufficiently definite and certain for both purposes. If a particular defendant is an individual, his counsel can ascertain from a reading of the petition that the plaintiff is asserting that such defendant is liable, either because he was physically operating the vehicle or because he is vicariously liable for the negligence of the actual driver. In a normal case, a defendant who is an individual knows quite positively whether or not he was physically operating the vehicle at the time and place mentioned in the petition. If he knows that he was not thus physically operating he can, in a normal case, ascertain readily whether the actual driver bore any legal relationship to him which might make him vicariously liable. If a particular defendant is a corporation, its counsel knows that the plaintiff is necessarily asserting vicarious liability against the corporation. In a normal case, counsel for the corporate defendant can

⁸⁰ *Young v. Featherstone Motors, Inc.*, note 98, *infra*.

⁸¹ See text preceding note 9, *supra*.

⁸² See text preceding note 99, *infra*.

readily ascertain whether there is any possibility that the corporation may be vicariously liable for the negligence of the actual driver. The evidence as to vicarious liability is normally readily available to the defendants (and quite unavailable to the plaintiff). Therefore, the corporate defendant should ordinarily have no difficulty in deciding whether to admit or deny vicarious liability. If it decides to deny such liability (by filing an answer containing a general denial), the plaintiff will have the burden of proof, and the evidence as to facts giving rise to vicarious liability will ordinarily be within the knowledge and control of defendant. If such a motion to make definite and certain is sustained on the assumption that defendant needs the information in order to prepare its defense, this amounts to the use of the motion to make definite and certain as a discovery device by the party who already has the evidence, against the party who does not have it, and who probably will have to depend upon discovery and cross-examination to prove an essential element of his case. If such a motion to make definite and certain is sustained on the assumption that the plaintiff should be forced to disclose the theory of his petition,⁸³ the court is acting contrary to a fundamental principle of code pleading by enforcing the fallacious "theory of a pleading" requirement.⁸⁴ And it is a particularly unjust application of this fallacious requirement, as the plaintiff in this situation often does not have enough information to determine to his own satisfaction the legal relationship between the defendants. Even less can he predict the determination by the jury as to such relationship.

Curiously, the Court of Appeals for Champaign County, in *Shrewsberry v. Wilson*,⁸⁵ although holding that the motion to make definite and certain was properly sustained, did recognize the plaintiff's need for discovery in this situation. It stated in part:

The fact that the pleading was subject to a motion to make definite and certain did not relieve the trial court of the duty to consider each interrogatory. In fact, some of the information sought thereby was peculiarly within the knowledge of the defendants and was essential in order to make the petition definite and certain.

However, it would appear that the solution of the court of appeals is unworkable in practice. If the motion to make definite and certain is sustained, one of the defendants may be out of the case before he can be compelled to make discovery. In *Shrewsberry* itself, the inter-

⁸³ This was apparently the assumption of the courts in *Sharkey v. Latham*, *supra* note 58, and in *Shrewsberry v. Wilson*, et al., *supra* note 61.

⁸⁴ See note 64, *supra*.

⁸⁵ *Supra* note 61.

rogatories were never answered. After remand, further motions were filed by the defendant and the case was settled before the interrogatories were answered.

Apparently both the trial court and the court of appeals in *Shrewsberry* thought that the fact that one of the two defendants was a corporation made this type of allegation subject to a motion to make definite and certain. In its journal entry, the trial court stated in part:

Until it appears by some allegation that the defendants are properly joined, and that a corporation and an individual can by some sort of mythical co-operation and simultaneous concert of action physically control the course and behavior of a motor vehicle. . . .

In its opinion, the court of appeals stated in part:

Davis v. Montei . . . is readily distinguishable on its facts from this case

But where, as here, one of the two named defendants is a corporation, the multiple operation of the tractor-trailer truck was clearly beyond the realm of possibility. . . .

On the other hand, the Court of Appeals of Summit County, in *Costilow v. Cunningham*⁸⁶ squarely rejected a similar argument by the defendant, stating that:

It is entirely conceivable that the corporate defendant, through its agent or servant, acting within the scope of his authority, could jointly operate said automobile with the defendant Cunningham. That, in our opinion, was the intendment of the allegations of the amended petition.

We are not in accord with the argument of the appellee that "If it is conceded that a corporation can do a physical act only through an agent, and if plaintiff alleges that the corporation was doing a physical act along with Larry B. Cunningham, it follows that Larry B. Cunningham must have been the agent through which the corporation was performing such physical act."

To us, that statement presents a non sequitur.

It is submitted that the Court of Appeals of Summit County is entirely correct in its analysis. The premise that a corporation can do a physical act only through an agent is undoubtedly correct. However, the conclusion that the individual defendant must have been the agent through which the corporate defendant was performing such a physical act, is, as the court stated, a *non sequitur*. It is likewise incorrect to conclude that, merely because one of the two named defendants is a corporation, multiple operation of the vehicle is beyond the realm of possibility.

If plaintiff alleges that "defendants" were operating a motor

⁸⁶ *Supra* note 60.

vehicle, and if D-1 is a natural person and D-2 a corporation, the allegation may not be construed to contain Proposition 2⁸⁷ (D-2 was physically operating the vehicle). However, it may be construed to contain Proposition 4⁸⁸ (an unnamed person who was physically operating the vehicle was the servant of D-2, within the scope of his employment). This interpretation is permissible because of the rule that proof that defendant's servant committed a tort is not a variance from an allegation that defendant committed the tort.⁸⁹ The applicability of this rule to single-defendant cases is readily apparent, but the fact that it is equally applicable to multiple-defendant cases may be overlooked. Apparently the possibility of this interpretation was completely overlooked in *Shrewsberry v. Wilson* and *Sharkey v. Lathram*. It was clearly recognized in *Costilow v. Cunningham*. The allegation may of course be construed to contain Proposition 5⁹⁰ (D-1 was the servant of D-2). But that possibility must not be permitted to obscure the presence of Proposition 4. And, since the allegation contains both Proposition 1 (D-1 was physically operating the vehicle) and Proposition 4 (an unnamed person who was physically operating the vehicle was the servant of D-2), the conjunction of Propositions 1 and 4 is equivalent to a further proposition that D-1 and the unnamed servant of D-2 were engaged in multiple physical operation. The presence of this conjunction of Propositions 1 and 4 means that, upon the face of the petition, the two defendants are properly joined, because they are concurrent tortfeasors. It is improbable that this conjunction of propositions will be proved at the trial. However, in the opinion of the writer, this improbability does not mean that there is anything undesirable about this allegation. It is merely an accident of language that this type of allegation permits recovery on the theory of *respondeat superior*, and at the same time permits the joinder of master and servant at the pleading stage and up to the close of the evidence. Defense attorneys understandably feel that the use of this allegation is an evasion of the Ohio rule against joinder of master and servant. This is probably their only objection to this allegation. If the Ohio rule forbidding joinder of master and servant should be abrogated, objections to this method of pleading would probably cease.⁹¹ Certainly, motions to make definite and certain should not be sustained, contrary to fundamental rules of pleading, for the sole purpose of permitting the enforcement at the pleading stage of the

⁸⁷ *Supra* note 74.

⁸⁸ *Supra* note 76.

⁸⁹ Text preceding note 6, *supra*.

⁹⁰ *Supra* note 77.

⁹¹ *Supra* note 70.

unsound Ohio rule against joinder of master and servant. Bad law should not be permitted to spawn more bad law.

Trial courts should exercise caution in sustaining motions to make definite and certain (and motions to strike). An apparently simple motion may present problems of surprising complexity. These problems often have little to do with the merits of the case, but they may require the expenditure of much time by court and counsel. Usually little guidance is to be found in reported opinions. The full implications of a ruling on such a motion are not always apparent. Serious and perhaps irreparable injustice may result from the improper sustaining of a motion to a pleading. Seldom if ever will injustice result from the overruling of such a motion, at least if the pleadings are kept from the jury.⁹² If a motion is filed to make definite and certain an allegation that "defendants" operated a motor vehicle, much injustice to the plaintiff may result from sustaining the motion. It is difficult to see how any injustice results to the defendants from overruling such a motion.

It is probable that the unsound Ohio rule that master and servant may not be joined has been tolerated this long only because plaintiffs have been able to postpone its operation until the end of the evidence by employing this allegation. If the courts deny to plaintiffs the possibility of postponing the operation of the anachronistic misjoinder rule, by sustaining motions to make definite and certain, then the misjoinder rule itself should without further delay be buried beside its forebears, the common law forms of action.

In *Sharkey v. Lathram*,⁹³ the court seemingly suggests that permitting this method of pleading encourages plaintiffs to join defendants against whom there is no possibility of recovery. This is difficult to prove or disprove. The problem of the groundless lawsuit will always be with us in this imperfect world. However, in 1959, the year in which *Sharkey* was decided, summary judgment procedure became available in Ohio.⁹⁴ If a petition is filed alleging that "defendants"

⁹² "In some counties there is a practice growing of judges overruling practically all motions to pleadings and never permitting the pleadings to be read to the jury or submitted to the jury. The reason behind such a movement is the realization by judges that no more than 10 per cent of all cases will ever reach a jury and if they do, it is the issues submitted to the jury by the Court that become important and not the pleadings. Hence, why should a Court and lawyers devote so much time to the question of pleadings when it ultimately plays such a minor part in any litigation? These are the matters that the Committee on Pleadings will study and attempt to formulate suggested uniform practices in this field." "The Ohio Judicial Conference," an address by the Honorable James L. McCrystal of Sandusky, Erie County Common Pleas Judge, to the Toledo Bar Association. 34 Ohio Bar 612, 613 (May 29, 1961).

⁹³ *Supra* note 58.

⁹⁴ Ohio Rev. Code § 2311.041.

operated a motor vehicle, and if a particular defendant actually had no connection whatever with the collision, he should ordinarily be able to demonstrate to the court on a motion for summary judgment (after full discovery has been made available to plaintiff) that there is no genuine issue of fact as to him, and, if he can do this, summary judgment should be entered in his favor.

MOTION FOR DIRECTED VERDICT

If plaintiff alleges that "defendants" operated the vehicle, but the evidence shows that only one defendant was physically operating, and that the only possible basis of liability of the other defendant is *respondeat superior*, it has been contended that there is a variance between the pleading and the proof (amounting to a failure of proof) and that a verdict should therefore be directed in favor of the defendants. This contention was rejected by the Court of Appeals for Franklin County in *Hite v. Andrews*.⁹⁵

On the theory of a joint enterprise, the plaintiff failed to make out a case. Victor Andrews not being the driver of the automobile, could only be held liable under the doctrine of *respondeat superior*. Agency was not made an issue by the pleadings. However, the issue was raised by the evidence. The entire case was presented to the jury on this theory. Perhaps, the plaintiff at the time Inez E. Andrews was dismissed as party-defendant should have moved for leave to amend the petition to conform to the proof. . . . Undoubtedly, the Court in the exercise of a sound discretion and in furtherance of justice would have permitted such amendment, as it does not appear that the defendant was taken by surprise or was in any manner misled.

The result reached by the court of appeals is correct, but its reasoning is questionable. The statement in the opinion that "agency was not made an issue by the pleadings" overlooks the well-established rule that "although the . . . petition . . . in an action *ex delicto* charges the conduct complained of directly against the defendant, proof that the tortious acts were committed by the defendant's servant or agent does not constitute a variance, and evidence that the wrong was committed by a servant or agent is admissible and will sustain a recovery in favor of the plaintiff."⁹⁶ Thus, the allegation that the automobile was operated by "defendants" should be construed to include the proposition that defendant Victor was operating through the instrumentality of an agent, defendant Inez,⁹⁷ and evidence was offered at

⁹⁵ 68 Ohio L. Abs. 342, 122 N.E.2d 494 (App. 1952).

⁹⁶ Annot., 4 A.L.R.2d 292, 302 (1941). See note 6, *supra*.

⁹⁷ This is equivalent to Proposition 5 or 6 in the text accompanying notes 77 and 78, *supra*.

the trial tending to prove this proposition. Thus there was no need to amend the petition to conform to the proof.

In *Young v. Featherstone Motors, Inc.*⁹⁸ the same court of appeals again rejected this contention:

Counsel for appellants contend that, upon such petition and proof, their motions for directed verdict should have been sustained. The point made by appellants is that, since the proof showed the relationship of master and servant in an action based on joint operation, the failure to allege agency in the petition was fatal to plaintiff's case The petition in this case states a cause of action; the evidence when given a construction most favorable to plaintiff constitutes a cause of action against each of the appellants. . . .

In our opinion the case was properly submitted to the jury on the petition and evidence adduced.

MOTION TO ELECT

Although plaintiff has alleged that "defendants" were operating the vehicle, if the evidence tends to prove that only D-1 was physically operating, and that the only possible liability of D-2 is based upon *respondeat superior*, because D-1 was the servant of D-2, and within the scope of his employment, a motion by a defendant to require plaintiff to elect between the two defendants should be sustained, under the present unsound Ohio rule.⁹⁹

We believe the rule that motions to elect should be sustained when the misjoinder of defendants first clearly appears is sound However, the practice ordinarily followed is that the election is required at the conclusion of plaintiff's case It is always safe procedure for a trial judge to postpone the order of election until the state of the record is such that there can be no other alternative than to sustain the motion.¹⁰⁰

Apparently some trial judges consistently refuse to order an election until the conclusion of all the evidence.

If no motion to require an election is made by a defendant, and if the court does not *sua sponte* order an election,¹⁰¹ and if the plaintiff does not voluntarily dismiss against one defendant, the case will go to the jury against both defendants. This was the situation in *Young*

⁹⁸ 97 Ohio App. 158, 124 N.E.2d 158 (1954).

⁹⁹ *Shaver v. Shirks Motor Express Corp.*, 163 Ohio St. 484, 127 N.E.2d 355 (1955); *Losito v. Kruse*, 136 Ohio St. 183, 24 N.E.2d (1940); *French v. Construction Co.*, 76 Ohio St. 509, 81 N.E. 751 (1907).

¹⁰⁰ *Rodenfels v. Great Eastern Stages*, 30 Ohio L. Abs. 42 (App. 1939). *Cf. Peitsmeyer v. Omar Baking Co.*, 95 Ohio App. 37, 117 N.E.2d 184 (1952).

¹⁰¹ The trial court *sua sponte* ordered an election in *Hite v. Andrews*, 68 Ohio L. Abs. 342, 122 N.E.2d 494 (App. 1952).

*v. Featherstone Motors, Inc.*¹⁰² When the case does go to the jury against both defendants, the only basis of liability of one defendant being *respondeat superior*, there is the possibility that the jury may be inclined to award damages out of the supposedly "deeper pocket," and so may return a verdict in favor of the plaintiff against the defendant master, together with a verdict against the plaintiff in favor of the defendant servant. Such "Robin Hood" verdicts are inconsistent and should not be permitted to stand.¹⁰³

Because of the possibility of this type of verdict, it would appear that in some master-servant cases defense counsel might decide that it is tactically desirable *not* to move to require plaintiff to elect. By the same token, if defendant does not make such a motion, plaintiff's counsel might decide that it is tactically desirable to dismiss voluntarily as to defendant servant.¹⁰⁴

If the Ohio rule is changed to permit joinder of master and servant, the tactical problem as to voluntary dismissal will probably be presented with increasing frequency.

CONCLUSION

The Ohio rule forbidding joinder of master and servant in tort actions when the master's liability is based solely on the doctrine of

¹⁰² 97 Ohio App. 158, 124 N.E.2d 158 (1954).

¹⁰³ 1 Restatement (Second), Agency § 217B(2) (1958); 4 Restatement, Torts § 883 comment *b* (1939); Note, "Joint and Several Suits Against Master and Servant for Tort of Servant," 26 Minn. L. Rev. 730, 734 (1942).

¹⁰⁴ Under Ohio Rev. Code § 2323.05, plaintiff has an unqualified right to dismiss without prejudice at any time before final submission. However, if the statute of limitations has run prior to such voluntary dismissal, a subsequent action would be barred, as the saving statute, Ohio Rev. Code § 2305.19, does not apply. *Siegfried v. Railway*, 50 Ohio St. 294, 34 N.E. 331 (1893). This rule as to a completely voluntary dismissal not attributable to any adverse ruling by the court does not appear to have been changed by *Cero Realty Corp. v. Am. Mfrs. Mutl. Ins. Co.*, 171 Ohio St. 82, 167 N.E.2d 774 (1960).

Another problem may arise in connection with an election between defendants, if venue is based on the general venue statute, Ohio Rev. Code § 2307.39, and if one of the two defendants is not a resident of the county of suit. In such case, if plaintiff elects to proceed against the nonresident defendant, and accordingly dismisses as to the resident defendant, there is some danger that the court would lose jurisdiction over the resident defendant, under the regrettable rule applied in *e.g.*, *Bucurenciu v. Ramba*, 117 Ohio St. 546, 159 N.E. 565 (1927). The rule was held to be inapplicable in *Scott v. Davis*, 173 Ohio St. 252 (1962), only because the nonresident defendant had entered a general appearance. In *Maloney v. Callahan*, 127 Ohio St. 387, 188 N.E. 656 (1933), the Supreme Court seemingly held that the rule did not apply when there had been no determination that the resident defendant was not liable; however, the case is not entirely clear. *Cf. Bennett v. Sinclair Refining Co.*, 144 Ohio St. 139, 57 N.E.2d 776 (1944). In motor vehicle cases, a plaintiff can avoid the problem by bringing the action in the county in which the injury occurred, under the special motor vehicle venue statute, Ohio Rev. Code § 4515.01.

respondeat superior is a hangover from the common law forms of action and is contrary to the Ohio statute governing joinder of defendants. It causes needless complexity in Ohio practice. It has been largely abandoned in other states. Joinder of master and servant is permitted by the Federal Rules of Civil Procedure. The Ohio rule forbidding joinder of master and servant should be abrogated by judicial decision, or if necessary by legislation.

In tort actions against multiple defendants, an allegation that "defendants" operated the motor vehicle (or engaged in some other activity) should be permitted. Even if the Ohio rule forbidding joinder of master and servant should be abrogated, this allegation is desirable and proper. However, until the Ohio rule forbidding joinder of master and servant is abrogated, it is particularly important that this allegation be permitted, so that the worst effects of the present Ohio joinder rule may be avoided.